Supreme Court, U.S.
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No. 94-1044

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GREGORY BERRY, PHILLIP MARCUS,
DENNIS MCALLISTER and FRANCIS ORAVETZ,
Petitioners,

v.

COUNTY OF SONOMA,
SONOMA COUNTY SHERIFF'S DEPARTMENT,
SONOMA COUNTY BOARD OF SUPERVISORS,
JANET NICHOLAS, JAMES HARBERSON, TIM SMITH,
NICK ESPOSITO, ERNEST CARPENTER
and RICHARD MICHAELSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners respectfully submit this reply under Sup. Ct. Rule 15.6 to arguments newly raised in the Brief in Opposition.

I. THERE IS A CONFLICT WITHIN THE CIRCUITS.

Respondents suggest that there is no difference between the Eighth Circuit's approach in *Cross v. Arkansas Forestry Comm'n,* 938 F.2d 912, 916-917 (8th Cir.

1991), *May v. Arkansas Forestry Comm'n,* 993 F.2d 632, 639 (8th Cir. 1993) and *Henson v. Pulaski County Sheriff Dept.,* 6 F.3d 531, 537 (8th Cir. 1993) and that of the Fifth, Ninth and Eleventh Circuits. Opp. at 12-13.

While the Eighth Circuit did affirm a partial summary judgment in *Henson,* it did so only because the appellants had urged an incorrect legal standard, that employees be "completely relieved of duty" before they lost their entitlement to pay. *See* 6 F.3d at 534-535. Once the Court adopted the "predominately for the benefit of the employer" standard, the appellants in *Henson* did not contend that they were still entitled to pay for the lunch periods at issue. *See id.*

The conflict in the Circuits involves the application of the "predominately for the benefit of the employer" standard. In this case, as in *Cross, May* and the second summary judgment reversed in *Henson,* the question is whether a given set of facts supports the plaintiffs' claim that their on-call duty has been spent "predominately for the benefit of the employer." The Eighth Circuit properly follows *Skidmore v. Swift & Co.,* 323 U.S. 134, 136-137 (1944) to leave this judgment for the fact-finder. The logic of the contrary rule in the Fifth, Ninth and Eleventh Circuits is that the appellate courts must make this determination *de novo* from national rules of law about what duties are unduly restrictive. If the issue of what time is deemed "predominately for the employer's benefit" is one of law, as the Fifth, Ninth and Eleventh Circuits hold, then the fact-finder will have only an advisory role.

II. THE NINTH CIRCUIT REVERSED ON ISSUES OF FACT, NOT LAW.

Respondents contend that the Ninth Circuit corrected errors of law, not fact, in reversing the District Court. In particular, Respondents argue that the District Court's analysis was legally inconsistent with the multi-factor test for compensability outlined in *Owens v. Local 169, Ass'n*

of Pulp & Paper Workers, 971 F.2d 347, 351 (9th Cir. 1992). Opp. at 4-5.

Respondents are incorrect. In *Owens,* the Ninth Circuit adopted a list of seven factors relevant to whether on-call time could be considered work time. 971 F.2d at 351. Respondents cannot argue that this list of factors was somehow at odds with the District Court's analysis in this case, because the *Owens* court adopted this list of factors directly from the District Court's published (and as yet unreviewed) decision in this case. *See id., citing Berry v. County of Sonoma,* 763 F.Supp. 1055, 1058 [Pet.App. 72a-73a] (N.D. Cal. 1991).

The Ninth Circuit reversed in this case, not because the District Court analyzed the wrong factors, but because the Ninth Circuit disagreed with the weight the District Court gave to the evidence on this issue. But the presence of a multi-factor balancing test on an issue does not permit an appellate court to exercise *de novo* review whenever it believes that the factors should have been weighed differently. *See, e.g., Knight v. United Farm Bureau Mut. Ins. Co.,* 950 F.2d 377, 381 (7th Cir. 1991).

For example, the Ninth Circuit believed that the District Court should have considered only death reports, rather than the more frequent work-related calls, *cf.* Opp. at 20-21 *with* Pet.App. 37a, 40a; that the District Court should not have given weight to the unwritten practice that coroners respond within fifteen minutes, or that the coroners had to make an on-site response to calls once every 4.25 calls, *cf.* Opp. at 21 *with* Pet.App. at 34a, 37a; that the District Court should have found pagers relieved restrictions so long as they were available, despite their unreliability for three of the four plaintiffs. *Cf.* Opp. at 21 *with* Pet.App. 40a-41a.

These are judgments of fact, not law. The appellate courts will commit themselves to a Byzantine structure of decisions about beepers and radios and babysitting and

leather crafts if they continue administering the boundaries of work *de novo*. It will be possible for appellate courts to reconcile apparent conflicts, like that between this case and *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, 112 S.Ct. 1310 (1992), only by drawing hyper-specific distinction between different types of work duty as a matter of national law.[1]

III. THE NINTH CIRCUIT WRONGLY HELD THE PETITIONERS' COLLECTIVE BARGAINING AGREEMENT AGAINST THEIR FLSA CLAIM.

As *amicus curiae* Service Employees International Union argues, the Ninth Circuit repudiated the anti-waiver rule of *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) by holding the petitioners' failure to secure on-call compensation to be a "predominant factor" for reversing the District Court's judgment. Respondents argue that the absence of an agreement is relevant as a matter of common sense, in that it supposedly shows that the coroners did not in fact consider on-call time to be work time. Opp. at 22-26.

Respondents may not have it both ways. If the parties' agreements or objections are relevant as a factual matter, then Respondents are bound by the District Court's factual judgment that the coroners were not paid for on-call duty because of budgetary constraints, not because of any genuine consensus that such duty was not work. Pet.App.

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[1] A newly reported example of the lengths to which the appellate courts must go in dictating the boundaries of work is *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125-26 (10th Cir. 1994). In that case, the Tenth Circuit found it necessary to reevaluate the factual record *de novo* after the District Court had made findings of fact under Fed.R.Civ.P. 52(a). The Tenth Circuit ruled as a matter of law that time meatpackers spend donning and doffing hard hats, safety glasses, earplugs and safety shoes was not "work," while time spent by specialists (i.e., those who used knives) donning and doffing specialized protective mesh was compensable "work." 38 F.3d at 1125-26.

55a-57a & n.9. By reversing on this issue, the Ninth Circuit engaged in its own appellate fact-finding, in substitution for the District Court's. Pet.App. 10a-11a.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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